

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1191

To be argued by
MICHAEL D. ABZUG

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1191

In Re
GAETANO CIRILLO,
A Witness Before the Grand Jury,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF AND APPENDIX FOR THE
UNITED STATES OF AMERICA**

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

MICHAEL D. ABZUG,
FREDERICK T. DAVIS,
*Assistant United States Attorneys,
Of Counsel.*

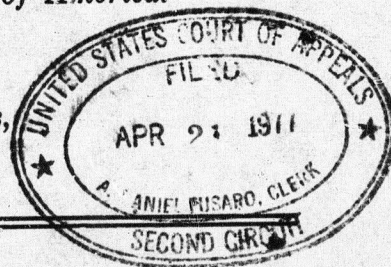


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1191

In Re
GAETANO CIRILLO,
A Witness Before the Grand Jury,
Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Gaetano Cirillo appeals from an order committing him to civil contempt pursuant to Title 28, United States Code, Section 1826(a) and (b), entered on March 24, 1977, in the United States District Court for the Southern District of New York by the Honorable Frederick Van Pelt Bryan, United States District Judge, and moves for bail pending the disposition of that appeal.

Statement of Facts

On March 1, 1977, Gaetano Cirillo appeared before a special grand jury and was advised that he had been subpoenaed "in connection with a grand jury investigation into alleged violations of the Federal laws prohibiting syndicated gambling and conspiring to do so by Anthony Salerno, also known as 'Fat Tony Salerno,'" as well as by himself and others. After Cirillo was advised of his constitutional rights, he was asked whether he knew An-

thony Salerno. Cirillo refused to answer on the grounds that a response would tend to violate his rights under the First, Fourth, Fifth, Sixth, and Ninth Amendments. Cirillo was then advised that the Honorable Marvin E. Frankel, United States District Judge, had signed an order which granted him "use immunity", pursuant to Title 18, United States Code, Section 6002, and that, accordingly, he was under a duty to answer the grand jury's questions. (A copy of that order is annexed hereto as Exhibit A.) Notwithstanding Judge Frankel's order, Cirillo persisted in his refusal to answer the grand jury's questions. He was advised that in light of his refusal, the Government would make an application the following week to have him held in civil contempt pursuant to Title 28, United States Code, Section 1826(a), and that if he were so cited, he would be remanded to the custody of the United States Attorney General until he testified or until the term of the grand jury expired on March 13, 1978. Cirillo then asked, pursuant to Title 18, United States Code, Section 3504, whether any questions that would be posed to him in the grand jury would be based upon any form of electronic surveillance. Cirillo's appearance was adjourned pending the Government's response to his motion for disclosure.

On March 8, 1977, Chief Judge David N. Edelstein issued an Order to Show Cause why Cirillo should not be held in civil contempt, pursuant to Title 28, United States Code, Section 1826, for refusing to testify before a grand jury on March 1, 1977, in accordance with Judge Frankel's order granting him testimonial immunity. To support its application for Order to Show Cause, the Government filed affidavits that described the electronic surveillance of Cirillo's communications which would be heard or used, directly or indirectly, by the grand jury and also submitted for an *in camera* inspection by the court, the

orders, affidavits, and applications that authorized that surveillance. A hearing was scheduled on March 10, 1977, before the Honorable Frederick van Pelt Bryan, United States District Judge.

On March 10, 1977, Cirillo appeared before Judge Bryan with his attorney, Harold O. Frankel, Esq. Cirillo argued that he was justified in refusing to comply with Judge Frankel's order to testify because it was overbroad" in that it did not specify which alleged statutory violations he was being ordered to give testimony about. Cirillo also claimed that the Government's response to his motion for disclosure of electronic surveillance was insufficient because it failed specifically to deny any unlawful electronic interception of his conversations. Judge Bryan gave Cirillo until the close of business on Wednesday, March 16, 1977, to file a memorandum of law to support his position. (That deadline was subsequently extended, with the consent of the Government, until Friday, March 18, 1977.)

On March 24, 1977, following the submission of memoranda of law by both parties pertaining to the issues raised by Cirillo. Judge Bryan signed an order citing Cirillo for contempt and remanding him to the custody of the Attorney General until he testified in accordance with Judge Frankel's order of immunity or until the expiration of the term of the grand jury, whichever occurred first. The order further specified that Cirillo's confinement should not exceed eighteen months. Accompanying his order, Judge Bryan filed a memorandum in which he stated that he was satisfied that "all of the orders, applications, and underlying authorizations [supporting the electronic surveillance of Cirillo's communications] are entirely in order and fully comply with the law [and that] [t]here is no merit to any of the contentions made by the witness with respect to the issuance of a contempt order . . ."

On March 30, 1977, Cirillo surrendered to begin serving his term of imprisonment. Cirillo never made before Judge Bryan an application for bail pending this appeal.

ARGUMENT

POINT I

Judge Frankel's Order Properly Conferred Testimonial Immunity Upon Gaetano Cirillo Pursuant To Title 18, United States Code, Section 6002.

Cirillo maintains that Judge Frankel's Order granting him immunity was defective since it "did not specify the crimes (under investigation)." This claim is meritless.

Judge Frankel's Order pursuant to Title 18, United States Code, Section 6002, granted Cirillo immunity co-extensive with his privilege against self incrimination and therefore suffices to supplant it. *Kastigar v. United States*, 406 U.S. 411, 462 (1971). Accordingly, it is well-settled that the scope of the Grand Jury's inquiry is immaterial insofar as the witness' Fifth Amendment privilege is concerned.* *In re Kilgo*, 484 F.2d 1215, 1221 (4th Cir. 1973). There is not even a colorable allegation that Judge Frankel's Order failed to comply with the statutory procedure set forth in Section 6002. His passing reference to the fact that "Mr. Abzug's letter presum-

* In any event, on December 8, 1976, Cirillo was advised by the Grand Jury that it was investigating alleged violations of Title 18, United States Code, Section 1955 and 371, which prohibit syndicated gambling and conspiring to do so. Later, on March 1, 1977, the Grand Jury advised him of some of the targets of the investigation including Cirino Salerno and "Fat Tony" Salerno (page 3 and 16 of the March 1, 1977 transcript).

ably referring to the affidavit submitted in support of the [Order of immunity] post-dated the authorization from the Department of Justice" is wholly without significance. Manifestly, the office of the United States Attorney will not make an application to the District Court Judge for an Order of immunity until *after* it has received authorization from Washington, D.C. *Thompson v. Garrison*, 516 F.2d 986, 988 (4th Cir. 1975).

POINT II

The Government's Response To Cirillo's Motion To Affirm Or Deny Whether Any Electronic Surveillance Of His Communications Was Involved In The Grand Jury's Investigation Was Sufficient.

Cirillo claims that the Government's affidavits are insufficient because they do not specifically deny that any of his conversations were unlawfully intercepted. As Cirillo recognizes, an *in camera* inspection of the orders set forth in the Government's affidavit complies with the procedure approved in this Circuit. *In re Persico*, 491 F.2d 1156 (2d Cir.), *cert. denied*, 419 U.S. 924 (1974); see, *In re Buscaglia*, 518 F.2d 77 (2d Cir. 1975). After a thorough *in camera* inspection of the orders authorizing the electronic interception of Cirillo's oral communications conceded by the Government, Judge Bryan found that "(a)ll of the orders applications, and underlying authorizations (were) entirely in order and fully comply with the law." (March 24, 1977, memorandum). Apart from these Orders, the Government unequivocally denied knowledge of any electronic surveillance. Cirillo has not set forth any facts or even allegations to support a claim that his communications were intercepted unlawfully pursuant to the orders submitted to the Court, nor does he suggest the possibility of any electronic surveillance beyond that conceded by the Government. Accord-

ingly, as Judge Bryan properly found, the Government's response to Cirillo's motion for disclosure satisfactorily denied any knowledge of electronic surveillance, lawful or otherwise, beyond that described in its affidavits. *United States v. Yanagita*, Dkt. No. 76-1405, slip op. 2599, 2606-07, 2609-10 (2d Cir. March 30, 1977); *In re Millow*, 529 F.2d 770, 773 (2d Cir. 1976).

POINT III

Cirillo Should Not Be Admitted To Bail Pending This Appeal.

Title 28, United States Code, Section 1826(b) expresses a clear policy against admitting to bail individuals who have been cited for civil contempt by stating as follows:

No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the termination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay.

Cirillo's points of appeal are clearly frivolous. Moreover, at no time did the appellant ever make for bail before Judge Bryan pending this appeal. This failure alone should preclude his present application to this Court for bail. Rule 9(b), Fed. R. App. P.

CONCLUSION

Cirillo should be denied bail pending the disposition of his appeal; the order of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

**MICHAEL D. ABZUG,
FREDERICK T. DAVIS,**
*Assistant United States Attorneys,
Of Counsel.*

APPENDIX

1a

Order

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In Re

GAETANO CIRILLO,

A witness before the Grand Jury.

On the application of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, filed in this matter on

And it appearing to the satisfaction of the Court:

1. That GAETANO CIRILLO has been called to testify before the Grand Jury of the United States presently empaneled within this District; and

2. That GAETANO CIRILLO has indicated that he will refuse to testify on the basis of his privilege against self-incrimination; and

3. That in the judgment of the said United States Attorney, the testimony from said GAETANO CIRILLO may be necessary to the public interest; and

4. The aforesaid application filed herein has been made with the approval of the Assistant Attorney General in charge of the Criminal Division of the Department of Justice, pursuant to the authority vested in him by Title 18, United States Code, Section 6003 and 28 C.F.R. 0.175:

Now, THEREFORE, it is ordered pursuant to Title 18, United States Code, Section 6002 that the said GAETANO

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Order

CIRILLO give testimony which he refuses to give on the basis of his privilege against self-incrimination as to all matters about which he may be interrogated before said Grand Jury, and it is further ordered that no testimony or other information compelled hereunder, or any information directly or indirectly derived from such testimony or other information, may be used against the said GAETANO CIRILLO in any case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with this Order.

This Order shall become effective only if after the date of this Order the said GAETANO CIRILLO refused to testify or provide other information on the basis of his privilege against self-incrimination.

Dated: New York, New York

March 1, 1977

MARVIN E. FRANKEL
United States District Judge

Application of Robert B. Fiske, Jr.
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re
GAETANO CIRILLO,
A witness before the Grand Jury.

ROBERT B. FISKE, JR., United States Attorney for the Southern District of New York, hereby makes application for an order pursuant to the provisions of Title 18, United States Code, Section 6001, et seq., compelling GAETANO CIRILLO to give testimony which he refused to give on the basis of his privilege against self-incrimination, as to all matters about which he may be interrogated before the grand jury of the United States presently empaneled within this District, and respectfully alleges as follows:

1. The said GAETANO CIRILLO has been called to testify or provide other information before said grand jury.
2. In the judgment of the undersigned, testimony from said witness may be necessary to the public interest.
3. The said witness has refused to testify on the basis of his privilege against self-incrimination.
4. This application is made with the approval of Richard L. Thornburgh, Assistant Attorney General of the Criminal Division, Department of Justice, pursuant

Application of Robert B. Fiske, Jr.

to the authority vested in him by Title 18, United States Code, Section 6003 and 28. D.F.R. 0.175. A copy of this letter from the said Assistant Attorney General expressing such approval is attached hereto.

/s/ ROBERT B. FISKE, JR.
ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York

Dated New York, New York

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Letter Dated January 13, 1977

DEPARTMENT OF JUSTICE

WASHINGTON 20530

January 13, 1977

Honorable Robert B. Fiske, Jr.
United States Attorney
Southern District of New York
New York, New York 10007

Attention: Mr. Michael D. Abzug
Assistant United States Attorney

Re: Grand Jury Investigation

Dear Mr. Fiske:

Pursuant to the authority vested in me by 18 U.S.C. 6003(b) and 28 C.F.R. 0.175(a), I hereby approve your request for authority to apply to the United States District Court for the Southern District of New York for an order pursuant to 18 U.S.C. 6002-6003 requiring Gaetano Cirillo to give testimony or provide other information in the above matter and in any further proceedings resulting therefrom or ancillary thereto.

Sincerely,

/s/ RICHARD L. TORNBURGH
RICHARD L. TORNBURGH
Assistant Attorney General
Criminal Division

Affidavit of Michael D. Abzug

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**In Re
GAETANO CIRILLO,
A witness before the Grand Jury.**

State of New York)
County of New York) ss.:
Southern District of New York)

MICHAEL D. ABZUG, being duly sworn, deposes and says:

1. Affiant is an Assistant United States Attorney in the office of the United States Attorney for the Southern District of New York.

2. This affidavit is submitted in support of the application for an order direct GAETANO CIRILLO to answer questions before a grand jury.

3. That said GAETANO CIRILLO has refused to testify before the said grand jury on the basis of his privilege against self-incrimination.

4. This application for immunity is made with the approval of the Assistant Attorney General of the United States and the United States Attorney for the Southern District of New York.

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Affidavit of Michael D. Abzug

5. This application for immunity is based on the belief that the information sought is necessary and material to the investigation now being conducted by the said grand jury with respect to violations of Section 371.

6. This application for immunity is made in good faith.

/s/ MICHAEL D. ABZUG
MICHAEL D. ABZUG
Assistant United States Attorney

Sworn to before me this
day of February, 1977

/s/ GEORGE L. NASH
GEORGE L. NASH

Notary Public, State of New York
No. 52-4629527
Qualified in Suffolk County
Commission Expires March 30, 1978